Supreme Court, U.S.
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No. 85-767

In The
Supreme Court of the United States
October Term, 1986

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, ET AL.,

Petitioners,

v.

CREST STREET COMMUNITY COUNCIL, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED*

I. Are attorney's fees recoverable under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, by prevailing parties for representation in a federal administrative proceeding under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which fees are not for time expended on a judicial proceeding in court?

II. Does the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, give prevailing parties in an administrative proceeding under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, a right to bring an independent civil action to recover attorney fees?

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* Rule 28.1 is not applicable in this case.

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REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 769 F.2d 1025 (4th Cir. 1985). A copy thereof is printed in the Appendix to the Petition for Writ of Certiorari at page App. 1. The opinion of the United States District Court is reported at 598 F.Supp. 258 (M.D. N.C. 1984). A copy thereof is printed in the Appendix to the Petition for Certiorari, at page App. 22.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 15, 1985. The Petition for Writ of Certiorari was docketed on November 13, 1985. Certiorari was granted on January 13, 1986. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

The statute involved is The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, which provides in relevant part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

The Respondents are civic organizations which represent the interests of the Crest Street community, a stable, cohesive black neighborhood in western Durham, North Carolina. Respondents commenced this civil action on November 30, 1983, in the United States District Court for the Middle District of North Carolina, Durham Division, seeking to recover attorneys' fees and other expenses, under The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, for representation (i) in an "administrative proceeding" under 49 C.F.R. Part 21 to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, and (ii) in a motion to intervene in *ECOS et al. v. Brinegar, et al.*, No. C-352-D-72 (M.D.N.C.) and leave to file a complaint therein to enforce Title VI and other statutes. (J.A. 3, 73, and 100). The representation arose out of controversy over the planned further construction of the East-West Freeway, a Federal-aid highway.[1]

On September 7, 1978, Respondents filed an "administrative complaint" with the Secretary of the United States Department of Transportation (USDOT), which alleged that the North Carolina Department of Transportation (NCDOT) in its planning for the construction of the freeway through the Crest Street community was in violation of Title VI and 49 C.F.R. § 21.7(d), and other statutes governing eligibility for federal-aid to State highway construction. (J.A. 73). At the time the "administrative complaint" was filed, NCDOT and the Federal Highway Administration (FHWA) were in the final stages of preparing a Revised Draft Environmental Impact Statement (RDEIS) for the freeway.[2] As proposed in the RDEIS, an interchange of the freeway would be placed in the midst of the Crest Street community which would take its church and park and displace a great many of its members. (RDEIS 73-75, 90, 97, and Figure 9). Shortly after the Complaint was filed, FHWA noted that preparation of an acceptable Final Environmental Impact Statement without resolution of the Crest Street issues was highly unlikely and urged the exploration of alternatives to resolve it. (FIAR 63).

The Secretary treated the "administrative complaint" as one made under 49 C.F.R. § 21.11(b) and consequently

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[1]The Federal-Aid Highway Act, as amended, 23 U.S.C. § 101 *et seq.*, provides for a national system of highways, with a portion of the cost to be borne by the federal government. Pursuant to this Act and its implementing regulations, 23 C.F.R., State highway departments, under federal oversight, plan and select the roads to be constructed. Since such plans and selections must be specifically approved by the federal Secretary of Transportation before any agreement for federal reimbursement may be entered into, in the final analysis, the decision as to the location and design of the highway is federal. *Fayetteville Area Chamber of Commerce v. Volpe*, 463 F.2d 402 (4th Cir. 1972).

[2]The federal responsibility under Section 102(1)(C) of the National Environmental Policy Act of 1971, 42 U.S.C. § 4332(1)(C), and implementing regulations, to prepare draft and final environmental impact statements is delegated to the State highway department, is accomplished under federal oversight, and the resulting statements are adopted by the federal Secretary of Transportation. 23 C.F.R. Part 771; *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021 (4th Cir. 1975). In the District Court in the present action, Petitioners filed copies of the Revised Draft Environmental Impact Statement for the freeway, together with copies of other documents received by Petitioners from the United States Department of Transportation in response to a Freedom of Information Act request. These documents appear in Volume III of the Record on Appeal in the Court of Appeals and are referred to herein as RDEIS, FEIS, and FIAR.

conducted an investigation under 49 C.F.R. § 21.11(c). (FIAR 115). NCDOT and FHWA continued to explore alternatives which might resolve the Crest Street issues but without success. By letter dated February 20, 1980, the Director of Civil Rights for USDOT informed the Secretary of NCDOT, "we find reasonable cause to believe that the construction of the Expressway (sic) along the alignment proposed in the Draft EIS would constitute a prima facie violation of Title VI, and, in particular § 21.5 (b) (3) of our departmental Title VI regulation . . .". (J.A. 97). Thereafter representatives of the Petitioners, the Respondents, the City of Durham and other interested parties held discussions to try to resolve the Crest Street issues. (FEIS 19, 20). Respondents' initial objective for filing the "administrative complaint" was to halt permanently the construction of the freeway or to divert it to another location outside of the Crest Street community so that the neighborhood could receive community development funds. (FIAR 71-83). On September 15, 1981, Respondents indicated that they were agreeable to change their initial objective and to discuss a mitigation plan which would need to include a number of items including payment of attorney fees for representation in the civil rights complaint. (FIAR 203-205). The issue of the payment of attorney fees was put aside, and representatives of the Petitioners, Respondents and the City of Durham proceeded to negotiate an acceptable mitigation plan. (See FEIS 18-21). In March of 1982 the parties reached a "preliminary agreement" on an acceptable mitigation plan. (See FIAR 206-215). The "preliminary agreement" was incorporated into the Final Environmental Impact Statement which was approved by FHWA on July 23, 1982.

(FEIS 99 *et seq.*). The mitigation plan in the FEIS was noted to be a "working document with the clear understanding by all parties that the final mitigation plan will contain the details of the implementation." (FEIS 108). This mitigation plan would compress the expressway and its interchange in the Crest Street community and would relocate the entire community as a whole to an adjacent site by the use of a combination of State, Federal and local programs.

Since February 20, 1973, further construction of the East-West Freeway had been enjoined in the *ECOS* case pending compliance with public hearing requirements of 23 U.S.C. § 128 and preparation and filing of a Final Environmental Impact/Section 4f Statement in compliance with 42 U.S.C. § 4332(1) (C) and 49 U.S.C. § 1653(f).[3] Obviously, and the disputants were clearly aware, implementation of the mitigation plan could not be carried out unless the injunction were dissolved. (See the last paragraph of the "Preamble" and paragraphs 1 and 2 of the Final Mitigation Plan.) (J.A. 109). In August of 1982, NCDOT filed a motion together with a copy of the FEIS and other supporting documents in the *ECOS* case seeking dissolution of the injunction. In October, 1982, Plaintiff Crest Street Community Council, Inc., and a private citizen of the Crest Street community moved to intervene in the *ECOS* action as parties-plaintiff and to file a com-

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[3]This decision is reported unofficially in 5 E.R.C. 1019, 3 E.L.R. 20303, affirmed *per curiam*, No. 73-1508 (4th Cir. 1973), 4 E.L.R. 20010. Federal jurisdiction over the State defendants in the *ECOS, Inc.*, case was "a form of pendant jurisdiction, but based upon necessity rather than convenience and limited to preventing emasculation of remedy clearly available against the federal (defendants)". *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (4th Cir. 1972).

plaint which would allege violation of Title VI and other federal-aid compliance laws and which would seek as relief (i) an injunction prohibiting extension of the freeway through the Crest Street community; (ii) a declaration that the acts and practices of the defendants violate Title VI and other laws; and (iii) an order that the defendants pay the plaintiffs' attorney fees and costs. (J.A. 100). On December 14, 1982, a day before the formal and ceremonial execution of the Final Mitigation Plan, but subsequent to the approval of its language by the parties and authorization of its execution, Crest Community Council, Inc., as an "applicant for intervention", joined in a Consent Judgment which dissolved the injunction in the *ECOS* case but explicitly reserved the right to pursue all claims in the event the mitigation plan not be fully implemented, and in addition reserved the claim for attorney fees against the State defendants. (J.A. 153). The application for intervention was not allowed and the applicants' proposed complaint was not allowed to be filed. In paragraph 22 of the Final Mitigation Plan, the parties make it clear that any right to recover attorney fees was not waived and any liability for the payment of such fees was denied.[4] (J.A. 130).

No action to effect compliance with Title VI by any means authorized by law was ever taken under the procedure provided by 49 C.F.R. § 21.13 *et seq.* Compliance

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[4]It would be ironic if the Respondents, by carrying out their agreement in the Final Mitigation Plan to support dissolution of the *ECOS* injunction so that the Final Mitigation Plan could be implemented, were thereby "bootstrapped" into recovery of attorney fees, the stumbling block issue which the parties had put aside at the onset of their negotiations and reserved for determination on a later day.

with Title VI was secured by informal and voluntary means.

On cross motions for summary judgment, the district court denied Respondents' motion, allowed the Petitioners' motion and dismissed the action. The United States Court of Appeals reversed the judgment of the District Court and remanded for determination of a reasonable fee. The Court of Appeals denied the Petitioners' motion for a stay of mandate pending Application for a Writ of Certiorari. The Petition for Writ of Certiorari was docketed November 13, 1985 and certiorari was granted January 13, 1986. On motion of Petitioners, the time allowed for filing their brief on the merits and the joint appendix was extended to March 27, 1986, and then was further extended to April 4, 1986.

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SUMMARY OF ARGUMENT

The language of the statute itself, and its legislative history, when viewed in the light of the enforcement scheme provided by Title VI and its legislative history, establish that Congress did not intend the Civil Rights Attorney's Fees Award Act of 1966, 42 U.S.C. § 1988, to authorize recovery of attorney fees for time spent (i) in filing a complaint by a private organization before the Secretary of Transportation alleging a violation of Title VI, (ii) in aiding the investigation of the complaint by the Secretary and upon a finding by him of a potential *prima facie* violation of Title VI, (iii) in negotiating a mitigation plan. This time was spent in the procedure provided by 23 C.F.R.

§§ 21.11, 21.12 under the *proviso* in 42 U.S.C. § 2000d-1. Section 1988 contemplates recovery of attorney fees for time spent on the litigation, including such discrete portion of time spent in a prior administrative proceeding that ordinarily would have been required to be spent on the litigation prior to filing the complaint in court. Here there was no litigation in court to enforce Title VI in which Respondents were a party or prevailed. Where the Respondents can be said to have "prevailed" was in the informal procedure provided by 23 C.F.R. §§ 21.11, 21.12 under the *proviso* of 42 U.S.C. § 2000d-1, not in an action or proceeding to enforce Title VI as contemplated by Section 1988.

By its language and legislative history Section 1988, as amended, is remedial only and intended only to complement the civil rights statutes and aid in their enforcement. It was not intended to create a private right of action to recover attorney fees in an independent civil action.

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ARGUMENT

CONGRESS DID NOT INTEND THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976, 42 U.S.C. § 1988, TO AUTHORIZE RECOVERY OF ATTORNEY FEES BY PREVAILING PARTIES FOR REPRESENTATION IN A FEDERAL ADMINISTRATIVE PROCEEDING UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000d, FOR TIME NOT EXPENDED ON A JUDICIAL PROCEEDING IN COURT.

As a general rule a prevailing litigant is not entitled to recover attorney fees from his adversary except as may

be authorized by statute. *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240 (1975). The *Alyeska* opinion notes on page 260 that "(w)hat Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." The opinion further notes that Congress has made such provisions for allowance of attorneys' fees in the enforcement of some civil rights statutes but not in others. In order to remedy this disparity Congress enacted the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988. S. Rep. No. 94-1011, 94th Cong., 2nd Sess. 2 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908.

In its opinion in this case, the Court of Appeals construed the statutory language of Section 1988 to explicitly cover the claim of the Respondents. *Crest Street Community v. N. C. Dept. of Transp.,* 769 F.2d 1025, 1028 (4th Cir. 1985). Petitioners disagree. In the language of Section 1988 Congress has not made specific and explicit provision for the recovery of attorney fees by the prevailing party in administrative proceedings to enforce Title VI. Other federal decisions support Petitioners' view of the language of the statute. In *Blow v. Lascaris,* 668 F.2d 670, 671 (2nd Cir. 1982) *cert. denied,* 459 U.S. 914 (1982) (2nd Cir. 1982) the opinion states "the language of this provision (Section 1988) appears, on its face, however, to refer only to a proceeding or action in a court, not to a state administrative proceeding." And in *Latino Project, Inc. v. City of Camden,* 701 F.2d 262, 264 (3d Cir. 1983), the Court stated "(d)espite the literal ambiguity of the words 'civil action or proceeding', the statutory context of those

words indicates that Congress intended section 1988 to authorize an award of attorney's fees only to a party who substantially prevails on a civil rights claim in a lawsuit: Specifically, section 1988 provides in any civil action and proceeding . . . the *court* . . . may allow reasonable attorney's fees. (emphasis added). Congress' use of the term 'court' within the same sentence that contains the words 'civil action or proceeding' leads us to believe that Congress had in mind only a lawsuit when it used those words."

Nevertheless, even in context of the statute the term "action or proceeding" is somewhat ambiguous; the word "proceeding" is broad enough to encompass a proceeding other than in court; and it is necessary to go beyond the words of the statute itself to its legislative history and to the enforcement scheme of the particular civil rights statute involved in order to determine the intention of Congress. *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980); *Webb v. County Board of Education,* 471 U.S. —, 85 L.Ed.2d 233, 107 S.Ct. — (1985). In examining the legislative history of Section 1988 in the light of the enforcement scheme of Title VI, it generally can be assumed that Congress was aware of its own laws and judicial interpretations of those laws. *Cannon v. University of Chicago,* 441 U.S. 677 (1979).

As pointed out in *Cannon,* at the time Congress was considering enactment of Section 1988, it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination which was enforceable by an action or proceeding in court. 441 U.S. 685, footnotes 6 and 7.

At that time, Title VI expressly provided for enforcement of its Section 601, 42 U.S.C. § 2000d, in several ways.

Its Section 603, 42 U.S.C. § 2000d-2, provided for judicial review of agency action, which includes private enforcement by any person aggrieved in a court. Its Section 602, 42 U.S.C. § 2000d-1, provided for enforcement by the Federal agency administering the Federal-aid program by (i) requiring the issuance of implementing rules, regulations, or orders of general applicability consistent with Title VI; (ii) cutting off Federal-aid "to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply . . ."; and (iii) "by any other means authorized by law." Its Section 602 expressly limited agency enforcement action as follows: "*Provided,* however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means."

The legislative history of Title VI indicated a strong Congressional enforcement policy in favor of seeking compliance by voluntary means. H. Rep. No. 914, 88th Cong., 2nd Sess. (1964), reprinted in 1964 U.S. Code Cong. & Adm. News 2391, 2400. As pointed out by Congressman McCulloch *et al.* in their additional views on H. R. 7152 (at page 2512 of the reprint of H. Rep. No. 914): "Generally, we believe that compliance with the provisions of Title VI can be accomplished through the application of persuasion and common sense." This Congressional policy favoring voluntary compliance was embodied in USDOT's Title VI regulations. 49 C.F.R. Part 21. Neither Title VI nor its USDOT regulations provided a right of private enforcement of Title VI by administrative proceeding before an administrative law judge or USDOT.

The regulations provided merely for agency receipt and investigation of private complaints, notice to the recipient (actual or potential) of whether the resulting investigation indicated a failure to comply, and if it did, encouragement of the recipient to resolve the matter by informal means whenever possible. This procedure was required before any actual agency enforcement action could be commenced. 49 C.F.R. §§ 21.11, 21.12.

Federal decisional authority on Title VI indicated that private relief against a Federal agency which was foot-dragging on enforcement of Title VI was available by court action. In *Adams v. Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973) the opinion states:

> "The Act (Title VI) sets forth two alternative courses of action by which enforcement may be affected. In order to avoid unnecessary invocation of formal enforcement procedures, it includes the proviso that the institution must first be notified and given a chance to comply voluntarily. Although the Act does not provide a specific limit to the time period within which voluntary compliance may be sought, it is clear that a request for voluntary compliance, if not followed by responsive action on the part of the institution within a reasonable time, does not relieve the agency of the responsibility to enforce Title VI by one of the two alternative means contemplated by the statute. A consistent failure to do so is a dereliction of duty reviewable in the courts."

The legislative history of Section 1988, considered in the light of the enforcement scheme and policy of Title VI, does not disclose a Congressional intention to provide for the recovery of attorney fees for representation in an administrative proceeding. S. Rep. No. 94-1011, 94th Cong. 2nd Sess., reprinted in 1976 U.S. Code Cong. & Adm. News. 5908. The report throughout indicates that Congress contemplated an "action or proceeding" in court rather than in an administrative proceeding.

The report indicates the purpose of shifting the burden of attorney fees in Section 1988, as in other attorney fee provisions in the civil rights statutes, was to encourage private enforcement of the civil rights laws by private citizens in the forums available to them. The report notes that Section 1988 follows the language of the attorney fee provisions for enforcement of Titles II and VII of the Civil Rights Act of 1964 and Section 402 of the Voting Rights Act Amendment of 1975. 42 U.S.C. § 2000e-5(k) for enforcement of Title VII and 42 U.S.C. § 1973l(e) for enforcement of the Voting Rights Act provided "in any action or proceeding" while 42 U.S.C. § 2000a-3(b) for the enforcement of Title II provided merely "in any action." No particular reason for choosing the former phrase for the language of Section 1988 was given or appears in the report.

As previously mentioned in this brief, the report notes that Section 1988 was enacted in response to the *Alyeska* decision which essentially held that attorney fees recoverable under the "private attorney general" exception to the general rule must be authorized by statute. We have been unable to find any decisions which authorize the recovery of attorney fees under the "private attorney general" exception to enforce the civil rights laws in an action or proceeding other than in court. Therefore the authorization of the recovery of attorney fees in Section 1988 under a "private attorney general" concept does not imply the authorization of recovery of attorney fees for representation in an administrative proceeding to enforce the civil rights laws listed in Section 1988.

The report speaks in terms of "prevailing parties in *suits*" (i) "in many *cases* . . ., the citizen who must *sue* . . ."; and ". . . to vindicate these rights in *court*." (emphasis supplied). The sentence in the report that "(t)hese fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy," when viewed in the light of the enforcement scheme of Title VI, is consistent with a policy favoring private enforcement in court rather than in an administrative proceeding.

The decision of the District Court in this case is in accord with the decision in *Latino Project, Inc. v. City of Camden,* 707 F.2d 262 (3d Cir.), and with the rationale of other federal decisions which have not allowed recovery of attorney fees under Section 1988 for representation in proceeding prior to the filing of an action in federal court to enforce one of the civil rights statutes listed in Section 1988. *Derheim v. Hennepin Cty. Bur. of Soc. Serv., Etc.,* 524 F.Supp. 1321 (D. Minn. 1981) aff'd on other grounds, 688 F.2d 66 (8th Cir. 1982); *Blow v. Lascaris,* 668 F.2d 670 (2d Cir. 1982); *Redd v. Lambert,* 674 F.2d 1032 (5th Cir 1982); *Horacek v. Thone,* 710 F.2d 496 (8th Cir. 1983); *Webb v. County Bd. of Educ. of Dyer County, Tenn.,* 715 F.2d 254 (6th Cir. 1983), aff'd 471 U.S. —, 85 L.Ed.2d 233, 107 S.Ct. 1923 (1985). See also *Toner v. C.I.R.,* 629 F.2d 899 (3d Cir. 1980). The decision of the Court of Appeals in this case is in conflict with the federal authority cited above and is erroneous.

In *Latino Project* a non-profit civil rights litigation group submitted an administrative complaint on behalf

of two Hispanic organizations to the Department of Housing and Urban Development (HUD) alleging that the City of Camden discriminated against Hispanics in the allocation and distribution of Community Development Block Grant (CDBG) funds in violation of Title VI and other laws. Although HUD found no violation, the City of Camden approved a revised funding proposal. The litigation group viewed the revised funding to be favorable to its clients and the result of its administrative complaint, and filed a complaint in district court seeking attorney's fees under Section 1988 for its representation. In its opinion the Third Circuit Court of Appeals interpreted the language of the statute and its legislative history to mean that Congress intended Section 1988 to allow recovery of attorney's fees for representation of a prevailing party in an action or proceeding to enforce Title VI in court and not in an administrative proceeding. It held:

> "We conclude that a plaintiff who has not filed a civil complaint on the merits of a claim under one of the civil rights statutes enumerated in 42 U.S.C. § 1988 is not entitled to attorney's fees under section 1988, even though he may have obtained substantial relief in an administrative proceeding."

In the instant case, the Fourth Circuit Court of Appeals disapproved of the reasoning of *Latino Project* and attempted to distinguish it on the basis that no action to enforce Title VI was filed in court while here Respondents filed a motion to intervene with a proposal complaint and "for all practical purposes intervention was permitted." 769 F.2d 1033. It further reasoned, that "if some type of court action were required to trigger § 1988's fee provision, plaintiffs would still have a claim to fees by virtue of their proposed complaint and motion to inter-

vene in the *ECOS* action, . . . defendants in that action recognized plaintiffs' status by including them in the consent judgment . . ., (p)laintiffs were in a comparable position to plaintiff whose suit is settled after merely filing a complaint, and we think such a party would also be considered sufficiently prevailing in a civil 'action' to merit an award of attorney's fees." This view of the proceedings in the *ECOS* case ignores the practical necessity that the *ECOS* injunction first be dissolved before any mitigation plan could be implemented, the terms of the plan agreement required the Respondents to support its dissolution, the validity of the plan agreement depended upon its dissolution, and the wording of the consent judgment is clear that Respondents' role in the *ECOS* action was not a basis for the recovery of attorney fees. The motion to intervene and file a proposed complaint in the *ECOS* case merely served the purpose of putting the moving parties in a position to receive notice of activity in the case, and to better carry out the plan agreement to support dissolution of the injunction. To the extent the motion can be viewed as adverse to the defendants in the *ECOS* case, it served as a signal that if, however unlikely, the mitigation plan was withdrawn, or negotiations completely broke down on a fundamental issue while the parties discussed the finishing touches, the movants were prepared, if allowed to intervene, to join sides with the opponents of the freeway. The movants-to-intervene were included in the execution of the consent judgment to dispose of the case entirely, to carry out their agreement in the mitigation plan to support dissolution of the injunction and to make their position clear that any rights to attorney's fees or under Title VI they might have were not prejudiced by their inclusion.

In the *Derheim* case, plaintiff sought recovery of attorney's fees under Section 1988 in an action filed in the District Court, for successful representation in a state administrative proceedings to review the nonrenewal of a foster family home license. For the sake of argument, the District Court assumed the administrative proceeding included and the complaint in the District Court alleged 42 U.S.C. § 1983 grounds. The District Court denied recovery for several reasons including that Congress did not intend to allow recovery for representation in optional state proceedings to enforce the civil rights statutes listed in Section 1988. 524 F.Supp. 1324. On appeal, the Eighth Circuit Court of Appeals affirmed but solely on the grounds that the state administrative proceeding was not one to enforce Section 1983. 688 F.2d 68.

In *Blow* the plaintiff prevailed in a state administrative proceeding upon her claim for a grant of medical assistance to cover the expenses of her son's emergency appendectomy. In a *per curiam* opinion, the Second Circuit Court of Appeals affirmed the dismissal of her complaint filed in district court to recover under Section 1988 for representation in the state administrative proceeding where there was no need to institute a federal court action on the merits. It interpreted the language of Section 1988 and its legislative history to mean that Congress intended the recovery to be for representation in court and not for state administrative proceedings.

In *Redd* plaintiff initially brought suit in state court to enjoin approval of tax assessment rolls until the tax assessment rolls were equalized among the counties on several grounds, including a Section 1983 claim. The trial

court held for plaintiff on several of the state grounds and on the Section 1983 claim and it awarded attorney fees under Section 1988. The state appellate court affirmed on the state grounds but ruled the state court lacked jurisdiction over the Section 1983 claim and reversed the award of attorney fees. Plaintiff then filed suit in District Court to relitigate its Section 1983 claim and to recover attorney fees under Section 1988 for their successful prosecution of the state court action. The Fifth Circuit Court of Appeals ruled that the Section 1983 claim was *res judicata* and that there could be no recovery under Section 1988 because there was no state court proceeding to enforce a provision of Section 1983 in which the plaintiffs could have prevailed.

In *Horacek* an attorney was appointed by a state court as a guardian ad litem to represent the interests of an inmate of a mental health facility in a proceeding before a State department to determine whether the inmate should be relocated from the central State facility to a community-based one. The proceedings were required by a consent decree in an action in federal District Court on an issue of whether conditions of confinement and the central State facility were violative of the Eighth Amendment's ban on cruel and unusual punishment. After denial of attorney fees at the state level, the attorney appointed applied in the federal action for attorney fees under Section 1988 for his representation in the state proceedings. The application was denied and on appeal, one of the reasons the Eighth Circuit Court of Appeals affirmed was that the non-mandatory state proceedings were not contemplated by Section 1988.

In *Garcia* a recipient of whose benefits under Title XX of the Social Security Act, 42 U.S.C. § 1397, had been terminated, successfully prevailed in a state administrative proceeding which included a Section 1983 claim and had her eligibility restored without filing a civil complaint on the merits. The settlement of the administrative proceeding contained an express reservation for counsel to seek attorney's fees. The recipient then filed a complaint in federal District Court to recover attorney fees under Section 1988, which was dismissed. On appeal the Tenth Circuit Court of Appeals, followed what it regarded as the weight of authority (*Webb* had not been decided by the Supreme Court at that time) and affirmed.

In *Webb,* a tenured black school teacher whose employment had been terminated was represented by counsel in State statutory proceedings before his school board on the charges and specific causes of his dismissal. At the board hearings the teacher presented evidence that his dismissal was racially motivated and unjustified. He also claimed his constitutional rights had been violated for failure to provide him with written charges or a pretermination hearing. The board finally decided to adhere to its decision to dismiss him, and the teacher then filed an action in federal District Court alleging that various civil rights statutes listed in Section 1988 had been violated in his dismissal and afforded him relief. As a result of his filing the action in court, settlement was quickly accomplished by consent judgment awarding damages, reinstating him, treating him as having resigned on the date of his dismissal and removing adverse comments about him from his employment file. He applied for allowance of attorney's fees under Section 1988 for time spent in the

school board proceeding and in the court action. The District Court excluded the time spent in the school board proceeding, but allowed recovery for the time spent on the litigation in court. The Supreme Court affirmed. Relying on *Hensley v. Eckerhart,* 461 U.S. 424 (1983), it held that "(t)he time that is compensable under § 1988 is that 'reasonably expended *on the litigation.*' Id. at 433, 76 L. Ed. 40, 1035 S.Ct. 1933 (emphasis added). When the attorney's fee is allowed 'as part of the costs' to use the language of the statute—it is difficult to treat time spent years before the complaint was filed as having been 'expended on the litigation' or to be fairly comprehended as 'part of the costs' of the civil action." Had there been the necessary evidence in the record, apparently it would have allowed recovery for time for "any discrete portion of the work product from the administrative proceedings (which) was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement."

Because 42 U.S.C. § 2000e-5(k) is one of the civil rights attorney's fee provisions upon which Section 1988 was patterned and the similarity of language between the two statutes, the Fourth Circuit Court of Appeals in its decision below viewed the opinion in *New York Gaslight Club, Inc., v. Carey,* 447 U.S. 54, as very persuasive if not controlling. This view of Section 1988 was rejected in the *Webb* decision, 85 L.Ed.2d 244, in the *Latino Project* decision, 701 F.2d 264, in the *Derheim* decision, 524 F.Supp. 1323, in the *Redd* decision, 674 F.2d 1036, in the *Horacek* decision, 710 F.2d 499, and in the *Garcia* decision, 729 F. 2d 692, because of the different enforcement scheme provided for Title VII from that provided for under the civil

rights statutes listed in Section 1988. *Carey* held that, because of the enforcement scheme Congress provided for Title VII of mandatory state administrative and court proceedings, it intended to allow recovery for representation in such proceedings. As described earlier herein, such an enforcement scheme does not exist for Title VI so that the line of reasoning in *Carey* allowing recovery of attorney fees for representation in administrative proceeding does not follow for recovery under Section 1988.

To an extent the opinions in *N.A.A.C.P. v. Wilmington Medical Center, Inc.,* 689 F.2d 1161 (3d Cir. 1982), *Ciechon v. City of Chicago,* 686 F.2d 511 (7th Cir. 1982) and *Lampher v. Zagel,* 755 F.2d 99 (7th Cir. 1985) are factually distinguishable from the *Webb* decision and these decisions can be reconciled with *Webb* and the decisions from other circuits not allowing recovery for time spent in prior administrative proceedings. In *Wilmington Medical Center, Inc.,* plaintiffs filed a complaint in federal District Court alleging a violation of Title VI in the relocation of sites for the provision of patient services which had a discriminatory effect on the basis of race, national origin and physical handicap. The Center's selection was approved by the Department of Health, Education and Welfare (HEW) and its implementation would be federally funded. The District Court temporarily stayed the action and ordered HEW to conduct a civil rights investigation. From its investigation, HEW concluded that the proposed plan constituted a *prima facie* violation of Title VI. As a result HEW and the Center negotiated a modified plan which was more favorable to plaintiffs. The defendants ultimately prevailed in the litigation under the modified plan. The opinion holds that plaintiffs were entitled to

recover attorney fees under Section 1988 for their efforts leading up to the modification plan, including their efforts in the negotiations between HEW and the Center which resulted in the modified plan, as part of the costs of the action. The investigatory proceeding and the negotiations for a modified plan were caused by the action in court and time spent by plaintiffs in aid thereof was on the litigation. In *Ciechon,* plaintiff brought a Section 1983 action in federal District Court which resulted in a temporary restraining order reinstating her on the City payroll pending an administrative hearing and decision on the changes for which she had been discharged. After the administrative hearing, the City reaffirmed its decision. The District Court held for the plaintiff and ordered her reinstatement with back pay. Plaintiff was allowed to recover attorney fees under Section 1988 including for time spent in the administrative hearing. The administrative hearing was caused by the action in court and time spent there was on the litigation. In *Lampher* plaintiffs brought a Section 1983 and Section 1985 suit in federal District Court seeking declaration that an Illinois statute was unconstitutional. The District Court abstained until a related subsequently filed state court action brought by the defendants against the plaintiffs was terminated. Ultimately the statute was declared unconstitutional in the state court action. Subsequently the District Court also held the statute unconstitutional and awarded the plaintiffs' attorney fees under Section 1988 for time spent in both the federal and state actions. The state action was caused by the federal action, and time spent in the state action was on the litigation.

In the instant case, the "administrative proceedings" was not the result of an action filed in court and time for

representation in filing the administrative complaint, in aiding the investigation and negotiating the mitigation plan was not on the litigation.

THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976, 42 U.S.C. § 1988, DOES NOT GIVE PREVAILING PARTIES IN AN ADMINISTRATIVE PROCEEDING UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000d, A RIGHT TO BRING AN INDEPENDENT CIVIL ACTION TO RECOVER ATTORNEY FEES.

If Respondents can recover attorney fees under Section 1988 for the time spent in representation in the administrative proceeding under Title VI *per se* under the circumstances of this case, because one can only recover in a court as part of the costs of the action and not in the administrative proceeding itself, the issue of whether Section 1988 creates a right to bring an independent civil action to recover attorney fees appears to be subsumed in the answer to the first question presented in the brief. If Respondents can recover for time spent on the motion to intervene and the consent judgment in the *ECOS* case, and for all or some part of the time spent on the administrative proceeding under Title VI because of the *ECOS* case representation, the issue of whether Respondents can do so in an independent action remains open to be decided.

Several federal decisions have held that no private right of action exists under Section 1988. *Derheim v. Hennepin Cty. Bur. of Soc. Serv., Etc.,* 524 F.Supp. 1321, 1325

(D. Minn. 1981), aff'd on other grounds, 688 F.2d 66 (8th Cir. 1982); *Estes v. Tuscaloosa County, Ala.,* 696 F.2d 898, 901. *Horacek v. Thone,* 710 F.2d 496, 499 (8th Cir. 1983). *Redd v. Lambert,* 674 F.2d 1032, 1036 (5th Cir. 1982) declined to rule on the issue. *Moor v. County of Alameda,* 411 U.S. 693 (1973), decided before Civil Rights Attorney's Fees Award Act of 1976 amendment, held Section 1988 did not provide a private party cause of action because it was remedial and intended to complement the various acts which do create federal causes of action for the violation of federal civil rights laws. The attorney's fee amendment is similarly remedial and intended. By the language of the act itself, recovery is allowed as "part of the costs," clearly meaning the costs of the action to enforce one of the civil rights laws listed in the statute, not an independent one. Furthermore, its legislative history recites that the amendment was intended to "provide the familiar remedy" of reasonable counsel fees. S. Rep. No. 94-1011, 94th Cong. 2d Sess. 2 (1976) reprinted in 1976, U.S. Code Cong. & Adm. News 5908, 5909-10.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the decision of the Fourth Circuit Court of Appeals in this case and affirm the decision of the District Court.

Respectfully submitted, this the 2nd day of April, 1986.

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